IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

MORTON SALT COMPANY,
Petitioner,

v.

THE G. S. SUPPIGER COMPANY,
Respondent.

No. ~~946~~. 49

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.


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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### MANIFESTLY THERE IS NO GROUND HERE FOR GRANTING THE PETITION.

This is a simple case involving the infringment of a United States Letters Patent in which the defendant moved for summary judgment under rule 56 of the Rules of Federal Procedure, basing its motion on a charge of monopoly. There are no conflicting decisions by Circuit Courts of Appeals. No public or unusual question is involved.

Manifestly, no question has been raised by the decision of the Seventh Circuit Court of Appeals which this Court will consider. Regardless of what the petitioner alleges in its petition and supporting brief, what the Seventh Circuit Court of Appeals *actually* said and held is clear and unambiguous, that Court stating (48 USPQ. 277, 280):

"* * * The decree before us was issued in a summary proceeding wherein the fact showing as to the extent of the influence of the agreement upon the salt business was almost nil.

* * * * * * *

"Due to the District Court's entry of its decree in a summary proceeding, we are not able to determine the monopolistic extent of plaintiff's contract. The Court was clearly in error in granting this summary judgment without an inquiry into the facts. Unless the defendant can make 'a definite factual showing of illegality' arising from plaintiff's agreement with its licensee, it was not entitled to judgment of dismissal. The presence of such a factual issue, ordinarily, is a bar to the granting of a summary judgment.

"The decree is reversed."

The Seventh Circuit Court of Appeals, by its opinion, made *no ruling one way or another* as to the alleged attempt of the respondent to extend its patent beyond the limitations of the claims. Therefore, exploded at the outset is the petitioner's basic theory that the decision of the Seventh Circuit Court of Appeals is in *conflict* with decisions of this Court, with decisions of other circuit courts of appeal, and with an earlier decision of its own! There can be *no conflict* where the decisions are *not on the same point!* The Seventh Circuit Court of Appeals ruled that the evidence adduced by the petitioner was not sufficient to sustain a dismissal of the complaint on a motion for summary judgment. That Court decided that the respondent is entitled to its day in Court.

Palpably, we have here in the petitioner merely another dissatisfied litigant who is asking this Court to rule upon a question of fact; who is asking this Court to hold that the evidence *is* sufficient for an equitable determination of the question of monopoly.

Therefore, the petition is clearly without even a vestige of merit and should be denied.

**General Statement.**

We submit that the foregoing succinct consideration effectively shows that the petition contains no ground for granting a writ of certiorari. However, to point out the inaccuracies contained in the petition and supporting brief, we present below a brief statement of the case, and by simple analyses show the fallacies of the petitioner's arguments.

The respondent filed its complaint (R. 2) in the United States District Court of the Northern District of Illinois, Eastern Division, charging infringement by the petitioner of its Letters Patent No. 2,060,645, granted for a depositing machine (R. 70). After filing an answer (R. 4) containing the usual defenses the petitioner amended its answer to incorporate an allegation of monopoly (R. 8). The petitioner took the depositions of Suppiger, president of the G. S. Suppiger Company (R. 11), and of Schofield, general assistant to the manager of the G. S. Suppiger Company (R. 24), and thereupon filing a motion for summary judgment under Rule 56 of the Rules of Civil Procedure (R. 53), accompanying the same with the affidavit of one Peterkin, Jr. (R. 54).

The few facts developed are not contested, although interpretations thereof differ. Actually, the respondent was not afforded an opportunity even to rebut the meager facts advanced as the basis of the petitioner's motion for summary judgment.

The main business of the respondent is canning (R. 12, Q. 18), the salt tablet and depositing machine business being secondary (R. 12). The petitioner is in the salt business as its primary effort.

The respondent leases depositing machines manufactured by or for it to canners for depositing salt tablets in canned foodstuffs, particularly canned tomatoes (R. 13, *et seq.*). Some leases contain the following clause (R. 32):

> "Scientific hereby grants Lessee a license to practice said inventions, and a lease to use only Tablet Depositing Machine No....., Type....., Serial No....., valued at $....., 64 on condition that such practice of said inventions and use of said Tablet Depositing Machine be limited entirely and exclusively to use with tablets obtained from Scientific."

Other leases contain the clause (R. 36):

> "The Lessee covenants and agrees that the said machine shall be used exclusively for depositing compressed flavoring tablets purchased from the owner and for no other purpose."

Each lessee pays the sum of $30.00 per year for use of the leased machine (R. 19), a year in the canning business being no more than two or three months. By the leases any canner may use depositing machines of the petitioner, or of any other concern, and may deposit petitioner's or other's salt tablets thereby. The petitioner, in fact, employs a restrictive clause similar to that used by the respondent (Pet. p. 4).

**Decisions of the Courts.**

The District Court entered on February 23, 1940, a final decree in favor of the petitioner, dismissing the complaint (R. 64).

The Circuit Court of Appeals for the Seventh Circuit, on January 14, 1941, handed down an opinion unanimously reversing the decree of the District Court (48 USPQ 277, and at the back of the record).

## ARGUMENT.

Before proceeding, we reiterate that the decree of the District Court was entered as a result of a motion for summary judgment under Rule 56 of the Rules of Civil Procedure. No opportunity was given the respondent to rebut facts which the petitioner has construed in its favor. The Seventh Circuit Court of Appeals reversed the lower court's decree, for it does not favor summary judgments based on incomplete facts and half-truths, and it readily perceived that the record in this case was of such a structure. It gave the respondent its day in court of which the petitioner now complains.

### The Petitioner Misapprehends the Decision of the Court Below.

At the outset it is manifest from the paragraph included under "matter involved" on page 7 of the Petition and Brief that the petitioner misapprehends the decision of the Seventh Circuit Court of Appeals, for the petitioner states, "The matter for determination of this Court is a question of law only." The Seventh Circuit Court of Appeals made no application of law whatsoever, but ruled that there were not sufficient facts of record upon which to base a decision on the point of alleged monopoly (see p. 2, supra).

Hence, the petitioner is actually asking this Court to decide a question of fact which is, "Are there sufficient facts here to make a determination of the question of alleged monopoly?"

### Restrictive Clauses Are Not Illegal Per Se.

Apparently the petitioner is proceeding on the fallacious theory that a tying clause involving a patented article is illegal per se. In the *International Business Machine Corporation v. U. S.*, 298 U. S. 131, 80 L. ed. 1085, this Court specifically stated (p. 1089):

> "But we do not place our decision on this narrow ground. We rest it rather on the language of § 3 of the Clayton Act which expressly makes tying clauses unlawful, whether the machine leased is 'patented or unpatented.' The section does not purport to curtail the patent monopoly of the lessor or to restrict its protection by suit for infringement. But it does in terms deny to the lessor of a patented, as well as of an unpatented machine, the benefit of any condition or agreement that the lessee *shall not use the supplies of a competitor* * * *." (Emphasis added.)

In other words, this Court held there that each case stands on its own factual structure and depends for decision on the attendant circumstances. The petitioner here relies *solely* on the *mere existence* of the tying clause and the patent.

The Seventh Circuit Court of Appeals fully appreciated the ruling of this Court in the *International Business Machine* case, *supra*, for it said (279):

> "On the other hand, a patentee is not handicapped in his commercial transactions because he owns a patent. What he could lawfully do before he acquired the patent, he may lawfully do after acquirement. Neither the Sherman Act, nor the Clayton Act, was intended to discriminate between patentees and others when it comes to use or sale of unpatented articles."

**There Is No Agreement as to the Interpretation of the Facts.**

The petitioner harps upon finding of fact No. 7 of the District Court, which is: "There is no genuine issue as to any material fact involved in this case" (R. 62). We point out that such merely means that what few facts are *of record* are not contested. On the *interpretation* of such facts *there is no agreement!* The point as urged by the petitioner is immaterial to the decision of the Seventh Circuit Court of Appeals.

**This Case Clearly Distinguishes From the Lecithin Case.**

The petitioner contends in its argument (Brief 11) that the Seventh Circuit Court of Appeals has obviously nullified its decision in *American Lecithin Co. v. The Warfield Co.*, 105 F. (2d) 207, and, further, that the facts here are ***substantially*** on all fours with the material facts in the *Lecithin* case. Surely the petitioner cannot be serious in such averments! How *can* a ruling of insufficient facts nullify the *Lecithin* decision?

As for the present case being on all fours with the *Lecithin* case, the petitioner certainly stretches the word "substantially," for in that case The American Lecithin Co. did not practice the invention of the patent; here, the respondent manufactures depositing machines, most of which it leases and some of which it sells (R. 13, 51, 52). There, The American Lecithin Co. derived its sole and total income from the sale of the unpatented lecithin as a limited monopoly; here, the respondent does derive an income from the sale of unpatented salt tablets on which it has no monopoly (as do the petitioner and others), but it *also* derives an income from the rentals paid for the leased machines ($30 each per year, R. 19, Q. 92) and from the outright sale of certain machines (R. 51, 52). There, The American Lecithin Co. entered into no contracts, merely selling lecithin under an implied agreement to use its patented process and to make the patented product; here, the respondent leases its own property by written agreement (R. 31, 34). There, full control of the sale of the unpatented product was through the patent sued on; here, what *small* control the plaintiff may exercise over salt tablets is by its *leases* and *not* by its patent in the *same manner that the petitioner exercises control over the salt tablets that it sells*, the petitioner employing a restrictive clause. Hence, as to the facts *proved*, there is *no* similarity *what-*

*soever* between the present case and *The American Lecithin Co.* case, *supra.*

**Petitioner's Application of the Rule of the Lecithin Case.**

The 1935 Practical Standard Dictionary of Funk & Wagnalls defines monopoly as "the exclusive right or privilege of engaging in a particular traffic" and "exclusive possession or control of anything." The petitioner fails to appreciate that monopoly incorporates control, and, therefore, erroneously applies the rule of the *Lecithin* case.

All of the respondent's licensees are free to buy or lease as many other kinds of depositing machines as they may desire. In such machines they may use anyone's salt tablets. The petitioner and other companies lease salt tablet depositing machines which do not come under the patent sued on. How, then, could the respondent *ever* establish a monopoly in salt tablets by its patent sued on?

And the respondent receives $30.00 per year for each of its leased depositing machines. The petitioner refuses to recognize that there could be any profit in such rental, although it amounts to 10 per cent per year of the cost of a machine (for two to three months service!), and the petitioner submitted *no* testimony to the effect that such $30.00 does not contain a profit.

## CONCLUSION.

We repeat that the petitioner is only another dissatisfied litigant. And its dissatisfaction consists *wholly* in its objection to granting the respondent its day in court.

We submit that the petition is peculiarly without merit, and that it should be denied.

Respectfully submitted,

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